

UNITED STATES OF AMERICA  
UNITED COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT  
Issued to: James D. Smart Z-263 02 4051

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2274

James D. Smart

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1

By order dated 28 July 1981, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for two months on six months' probation, upon finding him guilty of misconduct. The specification found proved alleged that while serving as Tankerman on board the Crowley Barge 4 under authority of the document above captioned, on or about 16 June 1981, Appellant wrongfully smoked a cigarette on the weather deck of said vessel while not in a gas free condition at Long Beach Berth 233 while bunkering the M/V ORIENTAL EXECUTIVE.

The hearing was held at Long Beach, California, on 6 and 16 July 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence one document, and an agreed stipulation of facts.

In defense, Appellant offered in evidence the testimony of two witnesses, including his own, and documentary exhibits.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of two months on six months' probation.

The entire decision was served on 31 July 1981. Appeal was timely filed on 5 August 1981 and perfected on 29 October 1981.

FINDINGS OF FACT

On 16 June 1981, Appellant was serving as Tankerman on board the Crowley Barge 4 and acting under authority of his document while the vessel was moored alongside M/V ORIENTAL EXECUTIVE in the port of Long Beach, California, at Berth 233. The vessels were made fast, with ORIENTAL EXECUTIVE moored starboard side to the pier and Barge 4 lying on the port side of ORIENTAL EXECUTIVE. Barge 4 was supplying the adjacent vessel with Bunker "C" fuel. During the bunkering operations, Appellant left the after deckhouse of the barge to go to the engineroom. To do so, he went out onto the weather deck of the barge. During this period, Appellant was smoking a cigarette. While on the weatherdeck he noted a Coast Guard Petty Officer observing him, and disposed of the cigarette overboard. At all material times Appellant was person-in-charge of the transfer operations. The facts as stated are not in dispute.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the regulations upon which the order relies do not apply under the facts in this case, and in any event the regulations concerning the smoking are not sufficiently clear to justify their application in the present case.

APPEARANCE: Ackerman, Ling, Russell, Linsley & Mirkovich of Long Beach, California, By Carlton E. Russell, Esq.

#### OPINION

Preliminarily, it should be noted that the regulation of direct concern in this case is 46 CFR 35.30-5(d). In the Decision and Order, reference appears inadvertently to have been made to 46 CFR 35.30-20(d). Appellant cites to and discusses the correct regulation in his brief on appeal.

The regulation at issue proscribes smoking "on the weather decks of tank vessels when they are not gas free or are alongside docks." (emphasis added). Special provision is made for designation of areas where smoking would be permissible at other times and places by the senior deck officer on duty, and for inspections and designation by that officer or the master of safe smoking areas which may be used during loading operations involving cargo of Grade A, B, or C.

I am not persuaded by Appellant's argument that this regulation is unclear or ambiguous. Simply put, smoking is prohibited on tank vessels if they are not gas freed and when they are alongside a dock. No clearer an expression of intent seems possible. The proscription, without regard to class of cargo or other times and places, applied to the tank barge involved here

unless it was gas free or it was not alongside a pier.

The record indicates that a Bunker "C" loading operation was in progress at the time of the smoking incident. From that fact there may be a permissible inference that the barge was not "gas free" as contemplated by 46 CFR 30.10-29. I am not inclined, however, to rest my decision on this point since the bunkering barge falls clearly within the second prong of the proscription in 46 CFR 35.30-5(d). For the purpose of that regulation, a vessel moored outboard of another vessel which is itself moored to a pier or berth, is "alongside a dock." Any other result would be contrary to two fundamental principles of construction. First, safety regulations should be broadly construed to effectuate their underlying purpose. Appeal Decision 1918, aff'd NTSB Order EM-31, 2 NTSB 2644. Second, language in a regulating should not be given a strainage or unreasonable meaning. In the present situation, to consider Barge 4 not to be alongside Berth 233 would be an absurd result inconsistent with the aim of the regulation to protect both vessels and port facilities.

Appellant's concern that the safety principle underlying this regulation is defeated since it would not apply to bunkering vessels transferring their product to anchored vessels is not persuasive. In the case of anchored vessels, the "gas free" restriction of the regulation still applies, although in a charge related to anchored vessels, different problems of proof might arise. This is true irrespective of the classification of the cargo. Additionally, the specific injunction to the master or senior officer on duty to designate safe smoking areas arises as a result of the classification of the cargo, not the location of the vessel. Thus, the more volatile cargoes have even broader safety proscriptions, unrelated to the gas free state of the vessel or its location.

Appellant also errs in his assertion that the "no smoking sign" required by 46 CFR 35.30-1(b) is "applicable to Grade A,B and C liquids - but not Grade E liquids." Brief at 5 (Appellant noted his view that Bunker "C" is Grade E, although no evidence appears of record to establish the flash point of the cargo - flashpoint being the determinative factor in classifying a cargo). The subsection mentioned, 46 CFR 35.30-1(b), applies to all tank vessels moored or anchored unless emptied and gas free, without distinguishing grades of cargo. Only 46 CFR 35.30-1(c) specifically addresses Grade A, B and C liquids, restricting the use of radio equipment during transfer of such volatile cargoes in recognition of the explosion hazard associated with static charges generated by electronic equipment.

The Bulk Cargo Transfer form referenced by Appellant as

Exhibit A in his appeal makes specific reference to smoking restrictions in the event Grades A, B, or C cargoes are to be loaded. It recognizes the special steps required of the master or senior duty officer when Grades A, B, or C are being loaded. The use of such a form does not excuse, the appropriate officer from his duty to ensure that other regulations applicable under the circumstances of each case are observed. The general safety regulations in Subpart 35.30 are a case in point, being broader in scope than the requirements contained in 46 CFR 35.35-20,30.

#### CONCLUSION

Based upon the record in this case, it is apparent that Appellant failed to comply with 46 CFR 35.30-5(d). The decision and order adjudged were properly arrived at in accordance with the controlling statutes and regulations.

#### ORDER

The order of the Administrative Law Judge dated at Long Beach, California, on 16 July 1981, is AFFIRMED.

R. H. SCARBOROUGH  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington, D.C., this 5th day of May 1982.